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NTSB Order No. EA-3628

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of July, 1992

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10600
v.)	
)	
ALBERT A. HALBERT,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral decisional order of Administrative Law Judge William A. Pope, II, rendered at the conclusion of an evidentiary hearing on March 29, 1990.¹ By that decision, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 30

¹An excerpt from the hearing transcript containing the decisional order is attached.

days,² for respondent's allegedly careless act that occurred when, as pilot-in-command, he failed to discontinue a flight after the aircraft became unairworthy due to a mechanical malfunction.³ In addition, the law judge found that respondent's actions were deliberate and, as such, served to disqualify respondent from participation in the Aviation Safety Reporting Program (ASRP). For reasons set forth below, we adopt the decision of the law judge, in part.

Many of the facts underlying the Administrator's complaint remain uncontested by respondent and were stipulated to at the hearing. Respondent admits that on August 5, 1988, he was pilot-in-command of an Air Today Swearingen Metroliner twin-engine turboprop aircraft on a non-revenue positioning flight from Billings, Montana to Stapleton International Airport, Denver, Colorado. The only passenger on board was Air Today's Director of Maintenance, who was riding in the copilot's seat. While the

²The Administrator amended the complaint at the hearing, changing the suspension period from 60 to 30 days.

³The Administrator alleged that respondent violated sections 91.29(b) and 91.9 (now 91.7(b) and 91.13, respectively) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91). These sections read, in pertinent part:

"§ 91.29 Civil aircraft airworthiness.

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. He shall discontinue the flight when unairworthy mechanical or structural conditions occur.

91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

aircraft was over Medicine Bow, Wyoming, the right engine oil pressure gauge began behaving erratically.⁴ As a precaution, respondent shut down the right engine.⁵ It is agreed that from the moment respondent observed the oil pressure gauge fluctuation, the aircraft was not airworthy. Respondent decided not to land at Laramie Airport, Laramie, Wyoming, although it was close by when he shut down the engine, choosing instead to proceed to his original destination, Stapleton Airport.

The Administrator maintains that respondent's decision was inconsistent with the level of safety expected of a commercial pilot and, as such, constituted a careless act. Respondent asserts that he evaluated all relevant factors before concluding that landing at Denver would be safer than landing at Laramie.⁶

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmance of the Administrator's order and, therefore, accepts the law judge's

⁴It was later determined that there was an oil leak.

⁵Respondent claims that, at this point, he maintained an altitude of approximately 13,500 feet and reduced the airspeed from 235 to 200 knots.

⁶The factors respondent claims to have considered include: The conditions at Laramie, such as size and location of the runways, temperature, elevation, wind conditions, and the availability of rescue equipment, as well as the single-engine performance of the Metroliner. He asserts that the presence of a cross-wind at Laramie was a significant factor in his decision not to land there because "[t]he Swearingen Metroliner is particularly difficult to land in a cross-wind, especially with one engine shut down, because of the idiosyncrasies of the aircraft's nose wheel steering system." Respondent's brief at 4-5.

decision regarding the FAR violations. We find, however, that respondent is entitled to a waiver of sanction under the ASRP.

The evidence supplied by the Administrator, along with the practical application of FAR section 91.29(b) as illustrated through relevant case law, supports by a preponderance the law judge's decision that respondent violated the regulations. Two FAA inspectors testified that a safe landing could have been effected at General Brees Field, Laramie. Respondent's main concern seemed to be that the runway at Laramie would have been too short to facilitate a safe landing.⁷ Despite this concern, he testified on direct examination that he probably could have completed a successful landing at Laramie.⁸

Given all the variables, respondent felt more comfortable and confident landing at Stapleton rather than Laramie.⁹ He had flown into and out of Stapleton on nearly a daily basis, while he

⁷One runway was 7,700 by 150 feet, and the other was 6,300 by 100 feet. Respondent claimed that he considered landing at the longer runway only. The FAA inspectors testified that this runway was more than adequate to accommodate respondent's aircraft. At the hearing, respondent testified that the longest runway at Stapleton Airport was over 11,000 feet and about twice as wide as the runways at Laramie, but he did not know the length or width of the particular runway on which he ultimately landed.

⁸In response to the question of whether he would have been successful if he had made the same landing at Laramie that he did at Stapleton, respondent replied, "It would have been successful, probably, yeah. It would have been a little more nerve-racking." (Tr. at 82.) He also stated that he would have had "considerably less" margin for error at Laramie. Id.

⁹In his answer to the Administrator's complaint, respondent, denying any wrongdoing, stated, "I determined the facilities at Denver to be far superior," and "I chose the highest probability of success." Complainant's Exhibit 1.

had landed at Laramie only 6 to 12 times over the preceding four years. He did not know what type of emergency equipment was available at Laramie,¹⁰ but he knew that Stapleton had extensive facilities. In addition, Air Today's maintenance base was located at Stapleton. All these factors led respondent to conclude that Denver was the best place he could land under the circumstances. The standard to be followed when an aircraft becomes unairworthy in flight, however, is to land at the first location "consistent with the safe operation of that aircraft."

Administrator v. Genereaux, 4 NTSB 1245, 1247, reconsideration denied, 4 NTSB 1258 (1984)(quoting the law judge's decision). Respondent should have landed at General Brees Field, Laramie, and by failing to do so, was careless. We agree with Judge Pope's assessment of this issue: "The criteria is not that he discontinue the flight at the best point available consistent with the safe operation of the aircraft." (Decisional Order at 9, emphasis added.) The Administrator set forth sufficient evidence to show that a landing at Laramie would have been consistent with the safe operation of the aircraft. By passing Laramie and choosing to land instead at an airport 130 miles away, respondent violated FAR sections 91.29(b) and 91.9.

Regarding sanction, respondent maintains that since he filed a timely report with the National Aeronautics and Space Administration (NASA) under the ASRP, and any violation that may

¹⁰ Respondent testified that he was not familiar with the type of emergency equipment at Laramie, yet he did not ask air traffic control at Laramie what equipment was available.

have occurred was inadvertent, he is entitled, as authorized by the ASRP, to avoid the suspension of his commercial pilot certificate. The ASRP allows pilots who timely file an incident report with NASA, to escape any certificate suspension stemming from that incident, provided that, among other things, the violation was inadvertent and not deliberate. See FAA Advisory Circular, AC No. 00-46C, ¶9(c)(1) (Feb. 4, 1985). The Administrator argues that respondent's FAR violations resulted from a deliberate act and, as a result, sanction should not be waived.

The law judge found the violations to be the result of respondent's deliberate action to continue the flight and, therefore, respondent was not entitled to the protection of the ASRP. We believe this finding is inconsistent with the meaning and purpose of the ASRP. Although respondent did violate the FARs, we do not believe he acted deliberately or recklessly.

The distinction between inadvertent and deliberate acts in the context of ASRP requirements was discussed by the Ninth Circuit Court of Appeals in Ferguson v. N.T.S.B., 678 F.2d 821 (1982). The court described deliberate conduct as "involving a purposeful choice between two acts.... [A] pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to verify his altitude." Id. at 828.¹¹

¹¹We have applied Ferguson before in, for example,

In Administrator v. Heil, 5 NTSB 1221 (1986), the respondent, pilot-in-command of a Boeing B-757, when compelled to shut down one engine in mid-flight, failed to land at the nearest suitable airport. The respondent claimed he was entitled to a waiver of penalty under the ASRP because he was unaware of the requirement to land at the first airport consistent with safety.

The Board was unable to attain a majority on the question of waiver. Members Lauber and Nall stated:

"The exceptions to the immunity provisions of the ASRP are necessary to preclude deliberate violations of the FARs by pilots who would knowingly and deliberately commit such violations because they know immunity is possible. Thus, the proper test in these cases is whether knowledge of the immunity provisions was a factor in deciding to undertake a course of action which is in violation of the FARs."

Id. at 1223. Acting Chairman Goldman and Member Burnett were concerned that the respondent was apparently ignorant of a regulation and that this ignorance was "tantamount to a deliberate violation." Id. In the instant case, however, respondent did not claim he was unaware of the FAR requirements.

Rather, he believed that he was acting in compliance with the regulations. Although he was mistaken in his belief, he neither deliberately sought to circumvent section 91.29(b) nor evinced reckless disregard for safety.¹²

(..continued)

Administrator v. Wood, 5 NTSB 2390 (1987)(low flight over congested area not inadvertent) and Administrator v. Smith, 5 NTSB 1560 (1986), reconsideration denied, 5 NTSB 1599 (1987)(helicopter pilot who continued flight after being advised of hazardous weather conditions was not entitled to protection of the ASRP, as the violations were not inadvertent).

¹²See Administrator v. McAnulla, NTSB Order No. EA-3090

Lastly, the Administrator argues that respondent did not timely file his report with NASA and is thus precluded from a waiver of sanction under the program.¹³ The filing requirements state that "[t]he person [filing the report must prove] that, within 10 days after the violation, he or she completed and delivered or mailed a written report of the incident or occurrence to NASA...." FAA Advisory Circular, AC No. 00-46C, ¶9 (c)(4). The only evidence offered at the hearing to prove compliance with the filing deadline was the receipt stamped by NASA indicating when the report was received. The date on the receipt was August 16, 1988, 11 days after the incident. Based on this information, it can be assumed that the report was mailed by August 15th; therefore, respondent fulfilled the filing requirement of mailing the report within 10 days of the incident.

(..continued)

(1990), where the respondent's reliance on an outdated navigational chart was inadvertent and not an example of a gross disregard for safety. He was not excluded from the benefits of the ASRP.

¹³The law judge did not expressly find that the written report was untimely filed with NASA. He merely said: "Although the Respondent filed a report with NASA concerning this incident, it was not received by NASA within ten days after the incident."

Decisional Order at 11. He found respondent ineligible for waiver on other grounds.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted in part;
2. The Administrator's order and the decisional order are affirmed, as modified herein; and
3. The 30-day suspension of respondent's airman certificate is waived under the ASRP.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.